QUESTION PRESENTED

May a city's anti-sign ordinance qualify as a valid content-neutral "place, time, or manner" restriction on protected speech where the ordinance prohibits most signs in residential zones but nonetheless permits signs whose contents fall into any one of nine relatively broad categories -- including signs advertising the sale or rental of real property?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1993

No. 92-1856

CITY OF LADUE, *et al.*,

Petitioners,

v.

MARGARET P. GILLEO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting free speech rights, particularly in the area of commercial speech. To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with commercial speech issues, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281 (1990); *Pacific Gas and Electric Co. v. Public Utility*

Comm'n of California, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions.

WLF and AEF recognize that state and local governments have a strong interest in regulating usage of their streets and sidewalks, in order to protect the public health and safety and to promote a clean and aesthetically pleasing environment. They further recognize that such regulation is not rendered illegitimate simply because it may inhibit citizens' efforts to express themselves.

WLF and AEF nonetheless are extremely concerned that state and local governments, in the exercise of their police powers, not pick and choose among the types of lawful expression they will encourage and those they will subject to strict regulation. All truthful, lawful speech is entitled to substantial First Amendment protection and should not be singled out for regulation simply because government officials deem its subject matter to be of lesser importance. If governments are interested in promoting aesthetic values by reducing the number of signs in a community, they should adopt sign limits that apply equally to all signs without regard to their content.

Amici submit this brief in support of Respondent with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Respondent's brief.

In brief, Petitioner City of Ladue, Missouri on February 25, 1991 adopted an amended ordinance (the "Ordinance") designed to restrict severely the placement of signs within the city. *See* Joint Appendix ("J.A.") 116-131. The Ordinance limits placement of commercial signs to commercially zoned and industrial zoned areas of the city (which comprise about 3% of Ladue's total area). The Ordinance bans noncommercial signs throughout the city (even in commercial zones where commercial signs are permitted), except that nine categories of signs are explicitly exempted from the ban -- based on the content of such signs.[1]

During American involvement in the Persian Gulf War in early 1991, Respondent Margaret Gilleo placed an 8.5" x 11" sign on the inside of a second-story window of her house that read, "For Peace in the Gulf." In response, City of Ladue officials informed her that the sign violated the Ordinance's anti-sign provisions. Ms. Gilleo thereafter sought a federal court injunction against enforcement of the ordinance.

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[1] The following signs are permitted throughout the city: municipal signs; subdivision and residence identification signs; road signs and driveway signs for danger, direction, or identification; health inspection signs; church, religious institution, and school signs announcing names, services, activities, or function (limited by number); identification signs for nonprofit organizations; signs identifying the location of public transportation stops; ground signs advertising the sale or rental of property; and signs identifying safety hazards. J.A. 121-122.

A "sign" is defined by the Ordinance as "[a] name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization, or place of business, or which is used to advertise or promote the interests of any person." J.A. 120. In its brief, Ladue contends that a "flag" (defined by Ladue in its brief as a "typically square or rectangular shaped" object made of "fabric material") does not come within the Ordinance's definition of a "sign." Pet. Br. 39.

On October 1, 1991, the United States District Court for the Eastern District of Missouri granted Ms. Gilleo's motion for summary judgment and permanently enjoined Petitioners (hereinafter "Ladue") from enforcing significant portions of the Ordinance. Petition Appendix ("Pet. App.") 20a-21a. The United States Court of Appeals for the Eighth Circuit affirmed the injunction in a decision issued on February 22, 1993. Pet. App. 1a-8a. This Court granted Ladue's petition for a writ of certiorari on October 5, 1993.

SUMMARY OF ARGUMENT

Ladue's anti-sign Ordinance cannot qualify as a reasonable "time, place, or manner" restriction on speech, because it is not content-neutral. It is uncontestable that Ladue distinguishes between permissible and impermissible signs based solely on sign content. Although Ladue contends that prohibited signs are banned solely because of their tendency to proliferate and not because of their content, speech regulation does not qualify as content-neutral simply because the regulator claims to have a pure heart. The Ordinance cannot qualify as content-neutral because it cannot be justified "without reference" to the content of the signs that it purports to regulate. Moreover, the evidence is overwhelming that Ladue's desire to ban political signs such as Ms. Gilleo's is directly related to the content of such signs: Ladue dislikes political signs because of their "tendency to proliferate," and it is their content that gives them whatever tendency they may have to proliferate.

The Ordinance cannot be upheld under a "time, place, or manner" analysis for the additional reason that it purports to regulate speech by a homeowner on her own property. The "time, place, or manner" doctrine is generally invoked to justify regulation of speech in public forums only. An individual's compelling interest in being permitted to speak freely on his own property counsels against upholding the Ordinance under any sort of time,

place, or manner rationale. That interest should be sufficient to trump any interest that a city may claim in promoting aesthetics, at least in the absence of evidence that the sign ordinance is part of an overriding scheme to preserve historically significant properties in their original state.

The Ordinance also cannot be upheld under the "secondary effects" doctrine, which can be invoked to uphold content-based regulation of speech where the regulated speech has undesirable secondary effects. The "secondary effects" doctrine may not be invoked where, as here, the secondary effects of the regulated speech are virtually identical to the secondary effects of similarly situated unregulated speech. Here, prohibited signs and permitted signs contribute to "visual clutter" to the same degree.

Because the "time, place, or manner" doctrine and the "secondary effects" doctrine are inapplicable to this case, Ladue can prevail in this action only by demonstrating a compelling interest in its sign regulations. Ladue cannot make such a showing. Indeed, Ladue's interest in continuation of its content-based sign restrictions is minimal, given that a content-neutral alternative is readily at hand: Ladue could adopt a content-neutral limitation on the total number of signs that may be posted at any residence or subdivision.

ARGUMENT

I. THE ORDINANCE MAY NOT BE DEFENDED AS A "TIME, PLACE, OR MANNER" RESTRICTION ON SPEECH, BECAUSE IT IS NOT CONTENT-NEUTRAL

This Court has repeatedly recognized that signs are an important medium of expression. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981)(plurality) ("[t]he outdoor sign or symbol is a venerable medium for expressing political, social and

commercial ideas"). As such, they are entitled to substantial protection under the First Amendment, which severely restricts the power of governments to regulate "protected" speech (i.e., all speech that does not fall into those few categories of expression -- such as obscenity or defamation -- deemed unworthy of significant First Amendment protection).

One limited category of permissible speech restriction which the Court has recognized is the "time, place, or manner" restriction:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989)(quoting *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984)).

Regardless whether Ladue could demonstrate that it can meet the second and third requirements of a valid "time, place, or manner" restriction on speech (narrow tailoring and alternative channels for communication), Ladue clearly cannot meet the content-neutrality requirement. The Ordinance is not content-neutral under any commonsense definition of that term: it prohibits some signs and permits others based solely on their content. Accordingly, the Ordinance cannot be upheld as a valid "time, place, or manner" speech restriction. Indeed, this Court has held repeatedly that content-based restrictions on speech are "presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991).

A. The "Time, Place, or Manner" Doctrine Is of Limited Applicability in Cases Where, as Here, the Government is Attempting to Restrict Speech on Private Property

Before addressing Ladue's contention that its Ordinance really is content-neutral, *amici* wish to question the extent to which the "time, place, or manner" doctrine is applicable to speech restrictions of this type. *Amici* submit that when, as here, the government is seeking to restrict speech on the speaker's own residential property, courts should be extremely reluctant to uphold the restriction under a "time, place, or manner" rationale.

The "time, place, or manner" doctrine traditionally has been applied to government restrictions on speech taking place on public property that has been dedicated as a "public forum." *Ward*, 109 S. Ct. at 2753. While it has on occasion been applied to uphold restrictions on speech on private property (*see, e.g., Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991)), such application has generally been limited to cases in which the expression being restricted was sexually explicit "adult" entertainment. The Court has recognized that the expressive content of "adult" entertainment such as nude dancing is sufficiently minimal that it is only "marginally" within the "outer perimeters of the First Amendment." *Id.* at 2460.[2]

Outside of the realm of "adult" entertainment, there is good reason to exercise extreme caution before applying the "time, place, or manner" doctrine to restrictions on speech on private property -- particularly where the property in question is the speaker's residence. The right

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[2] Indeed, in support of its assertion that the doctrine was applicable to restrictions on expression on private property, the Court in *Glen Theatre* stated that the doctrine had been applied to such restrictions "on at least one occasion" and cited as its precedent *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *Glen Theatre*, 111 S. Ct. at 2460 (plurality opinion). Both *Glen Theatre* and *Renton* involved government attempts to regulate "adult" entertainment.

of an individual to act freely in conducting affairs at his own residence is one of the most cherished rights in our society. The Court has "often remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick.'" *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)(quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969)(Black, J., concurring). *See Carey v. Brown*, 447 U.S. 455, 472 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). If it is to mean anything, protecting the "well-being . . . of the home" must include the right to speak freely from one's home.

Indeed, "time, place, or manner" restrictions on speech have most often been upheld on the grounds that they are designed to protect homeowners from intrusions on their property rights. *See, e.g., Ward*, 109 S. Ct. at 2756 (regulation of noise from rock concerts in a public forum upheld where designed to protect adjacent residents from unwelcome noise; the government's interest in noise abatement is at its "greatest" when designed to protect the "privacy of the home"); *Frisby v. Schultz*, 487 U.S. at 484-485. Where, as here, there is no record evidence that the sign displayed on one residence is visible from any other residence, the "privacy of the home" argument tilts decidedly against upholding a speech restriction based on a "time, place, or manner" argument.[3]

Nor do many of the arguments favoring application of the "time, place, or manner" doctrine to regulation of speech in public forums have any relevance to regulation of speech at one's home. For example, in upholding (under a "time, place, or manner" rationale) the right of a

[3] In *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court held that an ordinance prohibiting the display of "for sale" signs on private residences could not be upheld based on a desire to protect residents from exposure to signs, because there was no evidence that such signs "intrude[d] on the privacy of the home." *Linmark*, 431 U.S. at 94.

city to ban the posting of signs on public property, the Court noted that such signs are unattended after posting -- and the deterioration of signs that inevitably accompanies such inattention is a particular source of urban blight. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 809 (1984). In contrast, one can be reasonably confident that a sign posted on a personal residence will be posted in a tasteful manner and will be well maintained, because no one has a greater interest than the homeowner in maintaining the attractiveness of her property in order to maximize its value.[4] *See id.* at 811 ("private property owners' esthetic concerns will keep the posting of signs on their property within reasonable bounds").

In sum, when content-neutral restrictions on protected speech are aimed at speech on personal residences, there is little reason to show deference to such restrictions by testing them under the relatively inexacting requirements reserved for "time, place, or manner" speech restrictions. Rather, such restrictions on protected speech should be upheld only if their sponsor can demonstrate a compelling interest in the restrictions. In any event, the Court need not reach the issue of the applicability of the "time, place, or manner" doctrine to this case, since (as demonstrated below) the Ordinance so clearly is not content-neutral.

B. Ladue's Differentiation Between Signs Based on Their "Tendency to Proliferate" Is Not a Content-Neutral Approach

Even though the Ordinance on its face distinguishes between permissible and impermissible signs based on sign

[4] Indeed, in December 1990, when Respondent Gilleo discovered that signs she placed on her lawn had been vandalized, she not only righted the signs but also took the trouble to report the vandalism to the police in order to prevent its recurrence. *See* Pet. App. 22a-23a.

content,[5] Ladue argues that the Ordinance nonetheless qualifies as content-neutral for purposes of "time, place, or manner" analysis. Ladue argues that its sole concern is limiting the aggregate number of signs in the city, and that it distinguishes between permissible and impermissible signs based on whether they tend to proliferate -- with those having that tendency being totally banned. Pet. Br. 18-19. Ladue bases its content-neutrality claim on *Ward*, which stated:

> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. . . Government regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech."

Ward, 109 S. Ct. at 2754 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293). Ladue argues that the Ordinance's distinction between permissible and impermissible signs is "justified" based not the content of the signs in question but rather on whether those signs tend to proliferate.

Ladue has misconstrued *Ward*. Ladue interprets *Ward* as though the critical language read: "[A] justification based on some attribute of the regulated speech other than the message it conveys." That reading of *Ward* totally ignores the words "without reference"; *Ward* limits content-neutral status to those speech limitations that make absolutely no reference to the subject matter of the speech being regulated. Since the Ordinance undeniably makes

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[5] The Ordinance allows posting of signs that address any one of ten enumerated subject matters but prohibits all others. J.A. 121-122. Ladue does not contend that the ten categories of signs excepted from the general sign prohibition are so insignificant as to amount to a *de minimis* deviation from content neutrality. Rather, it argues that signs addressing the ten enumerated subject matters have been excepted for reasons unrelated to their content.

reference to subject-matter content of signs in distinguishing permissible from impermissible signs, it cannot qualify as "content-neutral" under *Ward*.

Certainly, the facts in *Ward* are readily distinguishable from this case. *Ward* involved an attempt by New York City to regulate sound amplification by all users of a bandshell located in Central Park. The regulations applied without regard to the content of the sound being amplified. The Court held that the regulations qualified as "content-neutral" for purposes of "time, place, or manner" analysis even though they may have had greater incidental effects on some bandshell users than on others. *Id.*[6] In contrast, Ladue does not apply the Ordinance to all signs, but rather only to those that do not fall within one of the ten enumerated subject-matter exceptions.[7] *Taxpayers for Vincent* is similarly distinguishable; the public-property sign-posting prohibition upheld in that case applied to all signs without regard to content.[8] The plaintiffs had not claimed that the challenged ordinance had singled out for prohibition the signs they wished to post based on their

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[6] Indeed, even the dissenting justices agreed that the sound amplification regulations "indisputably are content-neutral as they apply to all Bandshell users irrespective of the message of their music." *Ward*, 109 S. Ct. at 2761 (Marshall, J., dissenting).

[7] *Ward* would have been analogous to the present case if New York City had responded to citizen complaints regarding loud rock-and-roll concerts by regulating sound amplification at rock-and-roll concerts but not at other musical performances at the bandshell. Such a regulation would not have met the Court's requirements for content-neutrality, because even though it would have been directed at the only type of performances shown to have elicited complaints, it could not be said to be justified "without reference" to the content of the regulated speech.

[8] The Court stated pointedly in *Taxpayers for Vincent* that the relief sought by the plaintiffs (an exception from the sign-posting prohibition for political signs posted during the period immediately preceding an election) could constitute "constitutionally forbidden content discrimination" against other types of signs. *Taxpayers for Vincent*, 466 U.S. at 816.

content, but merely that the prohibition had had an adverse effect on their ability to communicate. *Taxpayers for Vincent*, 466 U.S. at 808-817.

Ladue argues that the Ordinance should be considered "content neutral" because there is no evidence to suggest that the city is in any way basing its actions on a disagreement with what Respondent Gilleo has to say; Ladue states that it would object just as strongly to a sign that read, "Wage War in the Gulf -- Kill Saddam Hussein." Pet. Br. 2. Ladue's argument is without merit, for at least four reasons.

First, attempts to suppress discussion of entire topics violate content-neutrality principles just as surely as do attempts to suppress a particular viewpoint. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *Metromedia*, 453 U.S. at 518-519 (plurality).

Second, this Court has explicitly rejected the notion that regulation of speech on a specified topic is not suspect under the First Amendment if the regulation is not based on hostility toward discussion of the topic. In *Simon & Schuster*, the Court held:

> The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Simon & Schuster need adduce "no evidence of an improper censorial motive." *Arkansas Writers' Project[, Inc. v. Ragland]*, 481 U.S. [221,] 228 [1987]. As we concluded in *Minneapolis Star*, "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly

> the exercise of rights protected by the First Amendment." 460 U.S., at 592.

Simon & Schuster, 112 S. Ct. at 509.

Third, content neutrality requires not only that disfavored speech not be suppressed but also that favored speech not be given special advantages. It matters not that Ladue views Ms. Gilleo's sign as no worse than the vast majority of signs that might be displayed in the city; so long as Ladue has chosen to provide special advantages to signs discussing certain topics (e.g., real estate "for sale" and "for rent" signs),[9] Ladue is not exercising content neutrality unless it gives the same advantages to identical signs discussing other topics.

Carey v. Brown well illustrates that point. In *Carey*, the Court struck down a law that prohibited residential picketing but that made an exception for labor picketing. There was no indication that the state legislature harbored hostility toward the subject matter of nonlabor picketing; indeed the mere idea of such a broad-based hostility is absurd, since the vast majority of topics of public discussion concern nonlabor issues. Nonetheless, the Court held that the state impermissibly deviated from content-neutral ideals when it decided to permit picketing on one favored topic without permitting picketing on other topics. *Carey*, 447 U.S. at 465-469.[10]

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[9] Ladue suggests that the only reason that it permits "for sale" and "for rent" signs is that it is required to do so under MIssouri law. That argument cannot excuse Ladue's deviation from content-neutrality in its suppression of signs; Missouri certainly never required Ladue to impose a ban on residential signs. If Ladue is serious about adopting a ban on residential signs that can qualify as "content-neutral," its proper course is to begin by petitioning the Missouri legislature to repeal the law in question.

[10] This is not to say that Ladue must choose between banning all signs or lifting all sign restrictions. To the contrary, Ladue is free to adopt content-neutral regulations, such as limitations on the number of

(continued...)

Fourth, Ladue is simply wrong in claiming that there is no evidence that it seeks to prohibit Ms. Gilleo's sign and other political signs due to an animus against them. To the contrary, the evidence is overwhelming that Ladue's desire to ban political signs is directly related to the content of such signs. Ladue has adduced evidence that political signs tend to proliferate more than other types of signs in the absence of restrictions. *See, e.g.*, J.A. 154-155. But signs tend to proliferate precisely because of their content: proliferation is a sure indication that the ideas being expressed through such signs are popular ideas that many people wish to express. Accordingly, a ban on signs that "tend to proliferate"[11] is another name for a ban on signs expressing popular ideas. In other words, Ladue is openly admitting that it dislikes political signs because of their subject matter -- not because of a dislike of things political but because it fears that political signs (due to the

[10] (...continued)
signs per lot. Moreover, Ladue is free to adopt non-content-neutral regulations to the extent that it can articulate compelling reasons for doing so. *Burson* demonstrates that the Court is receptive to arguments that a state actor has a compelling reason for engaging in content-based speech restrictions. *Burson*, 112 S. Ct. at 1851-1858 (Court applies strict scrutiny but nonetheless upholds content-based restriction on speech near polling places). Ladue might well be able to demonstrate that safety concerns provide it with a compelling interest in permitting road signs as an exception to a general sign ban.

[11] We find somewhat comical Ladue's repeated reference to signs that "do not proliferate" or "tend to proliferate." Such phrasing suggests that signs have a life of their own and that some signs, if left unchecked, will reproduce of their own volition. The Court should not permit such phrasing to obscure the fact that no sign is posted unless an individual wishing to convey an idea chooses to post it. Thus, signs that can be said to "tend to proliferate" are precisely those types of signs that address issues that the general public cares most deeply about. It makes no sense to suggest that lesser degrees of First Amendment protection should be afforded to discussion of precisely those issues that are of greatest public interest.

popularity of their subject matter) will proliferate and thereby offend aesthetic sensibilities.[12]

Ladue argues finally that the court of appeals erred in denying the Ordinance "content-neutral" status based solely on the fact that the Ordinance in certain instances favors commercial speech over noncommercial speech.[13] Although conceding that *Metromedia*'s plurality opinion lends strong support to the court of appeals's position, Ladue argues that that opinion is no longer good law after *Discovery Network*, which (according to Ladue) held that courts should not place undue emphasis on the distinctions between noncommercial and commercial speech. Pet. Br. 33-34. Ladue's argument is off the mark. Regardless whether, after *Discovery Network*, Ladue would be justified in affording a lesser degree of protection to commercial signs than to noncommercial signs, nothing in *Discovery Network* licenses a municipality to discriminate *in*

[12] We note in passing that Ladue has produced virtually no evidence that political signs tend to proliferate on residential property if left unrestricted. Ladue's experts who spoke of proliferation of political signs in other jurisdiction all referred at least in part to posting of signs on public property. *See, e.g.*, J.A. 154-155, 197. An individual homeowner's strong interest in maintaining the value of his/her property provides a powerful incentive for ensuring that signs will not be posted on residential property in a cluttered manner. Indeed, then Justice Rehnquist, in his *Metromedia* dissent, indicated his belief that permitting political signs on residential property in the period immediately prior to a political campaign is likely to have only a limited effect on the aesthetics of a city. *Metromedia*, 453 U.S. at 570 (Rehnquist, J., dissenting). Given the seasonal nature of most political signs, there is serious reason to doubt that they proliferate more widely than real estate "for sale" signs -- which are excepted from the Ordinance's general ban because of their supposed tendency not to proliferate but which can be found in Ladue on a year-round basis.

[13] Commercial signs are generally permitted in the 3% of Ladue that is zoned industrial or commercial, while noncommercial signs of the type that Ms. Gilleo attempted to display are permitted nowhere in the city. Also, at least two specific types of commercial signs -- "for sale" and "for rent" signs -- are permitted throughout the city.

favor of commercial speech on the basis of its content -- as Ladue has done in this case.

In sum, Ladue cannot escape the fact that in banning most signs but excepting signs that address any one of ten enumerated subject matters, the Ordinance is engaging in content-based discrimination. As such, it may not be defended as a reasonable "time, place, or manner" restriction on speech.

C. Signs on Residential Houses Are Not Comparable to the "Billboards" Being Regulated in *Metromedia*

Ladue and its supporting *amici* have analyzed the Ordinance as though it were governed by the law of "billboards" as established in *Metromedia* and elsewhere. In fact, the 8.5" x 11" window sign at issue in this case bears scant resemblance to the billboards at issue in *Metromedia*. *Amici* WLF and AEF respectfully submit that the absence of content-neutrality in the Ordinance becomes significantly clearer if one focuses on the unique aspects of residential window signs as a medium of expression.

The Court emphasized in *Metromedia* that its constitutional analysis of the extent to which a government may regulate expressive activity varies considerably depending on the medium of expression sought to be employed. The Court said:

> Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses, and dangers" of each method. We deal here with the law of billboards.

Metromedia, 453 U.S. at 501 (plurality)(quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949).

Moreover, the Court had a very narrowly defined concept in mind when it was discussing "billboards" in *Metromedia*. The San Diego ordinance at issue in that case sought to regulate "outdoor advertising display signs," defined by the ordinance as "rigidly assembled sign[s], display[s], or device[s] permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." *Id.* at 541 n.3 (Stevens, J., dissenting). Not included within the definition were signs "such as . . . a small sign placed in one's front yard proclaiming a political or religious message." *Id.* at 545 n.11 (Stevens, J., dissenting). In other words, signs such as the sign placed by Ms. Gilleo in her window -- which was neither "permanently attached" to her house nor "rigidly assembled" -- were not at issue when the Court addressed the "law of billboards" (*id.* at 501) in *Metromedia*.

Placing a sign directly on one's personal residence has much more in common (as a medium of expression) with building a house with a distinctive architectural design than with erecting a permanent billboard structure that abuts a major road. A sign placed on one's personal residence is no more intrusive on the aesthetic sensibilities of passersby than the personal residence itself (because it cannot be larger than the residence), and is likely to be far less intrusive than a sign erected in the form of a free-standing billboard.

It is incontestable that numerous design features of every house have expressive content. For example, virtually every homebuilder designs his or her homes with some artistic statement in mind; a plastic reindeer or outdoor Christmas lights attached to a house most likely are intended to convey a message of warm tidings during the holiday season; religious items such as a mezuzah placed on a door post convey religious sentiments. For purposes of First Amendment analysis, there is no reason to treat signs placed on a personal residence any

differently from other expressive features of the residence that are visible to passersby.

Accordingly, a city is not abiding by concepts of content-neutrality if it prohibits placement of signs on personal residences, unless it also closely regulates all aspects of house design.[14] There is no evidence in this case that Ladue attempts to exert any such control of architectural design in the city. Landowners in Ladue apparently are free to express themselves as they choose when it comes to designing their personal residences -- provided only that such expression not be in the form of written words. For all practical purposes, such discrimination against the written word amounts to content-based discrimination, because so many ideas cannot adequately be expressed nonverbally.

Ladue's most likely would respond along the following lines: it finds a Tudor house design to be more aesthetically pleasing than the same house design interrupted by a sign containing several words -- and it ought to be permitted to define and pursue its own aesthetic goals. But any such response serves to highlight the dangers of granting communities the unfettered right to regulate expressive activities based solely on aesthetic goals. As Justice Brennan noted, "[T]he inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to . . . determin[e] whether the actual objective is related to the suppression of speech." *Taxpayers for Vincent*, 466 U.S. at 822 (Brennan, J., dissenting). *See also Metromedia*, 453 U.S. at 510 (plurality)("esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be

[14] Thus, a community such as Williamsburg, Virginia might be said to be acting in a content-neutral fashion if (for reasons of historical accuracy) it were to ban placement of signs on personal houses, provided that it closely regulated all home construction in order to preserve historical accuracy in architectural design.

carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"). A prohibition against signs on personal residences would not amount to content-based discrimination against protected speech if it were based on a desire to eliminate "visual clutter," but it would amount to content-based discrimination if it were based on an assertion that the contents of the signs were aesthetically displeasing. One could well imagine that the latter rationale motivates many sign bans -- suburbanites often seek an environment where they can put the harsh realities of commercial and political life out of their minds. But if communities can defend sign bans based merely on a claim that they serve "aesthetic goals" which are in turn defined as requiring the elimination of the disfavored signs, reviewing courts will have no means of ascertaining whether expressive activity is being suppressed on the basis of content.

The Court said in *Metromedia* that freestanding billboards as defined in that case raised sufficient "visual clutter" concerns, that it would assume that San Diego's expressed aesthetic concerns over the proliferation of billboards did not amount to disapproval of the messages conveyed by billboards. Similarly, in *Taxpayers for Vincent*, the court recognized that the "visual clutter" problems arising from permitting unrestricted posting of political signs on public property were sufficiently large so as negate any inference of content-based discrimination. But a homeowner's vested interest in maintaining the value and attractiveness of his/her own home negates any realistic possibility that "visual clutter" will be a serious problem if communities do not control placement of signs on private residences. Accordingly, the Court should be unwilling to indulge a community's inherently unprovable assertion that it seeks to ban most signs on personal residences for aesthetic reasons unrelated to efforts to suppress ideas commonly conveyed by signs. Unless a community can demonstrate a Williamsburg-like commitment to regulating all aspects of residential housing design, the Court should deem all aesthetics-based efforts to ban signs on residential housing to constitute content-

based discrimination against the messages conveyed by such signs.

In sum, *amici* respectfully suggest that aesthetic considerations can virtually never constitute a content-neutral ground for prohibiting placement of a sign directly on one's personal residence. Accordingly, the Ordinance would not qualify as content-neutral (for purposes of "time, place, or manner" analysis) even if Ladue had not included ten broad exceptions to the general ban on signs.

II. THE "SECONDARY EFFECTS" TEST IS INAPPLICABLE TO THIS CASE

Ladue argues alternatively that even if the Ordinance is found not to be content-neutral, it can be sustained under the "secondary effects" test -- a test that accepts a seemingly content-based regulation as content-neutral provided that the regulation was adopted solely for the purpose of eliminating an undesired "secondary effect" of the speech being regulated. Pet. Br. 34-35. Ladue argues that the Ordinance survives the "secondary effects" test because it was adopted not for the purpose of suppressing the subject matter of signs, but rather solely for the purpose of eliminating the "visual blight" caused by the proliferation of signs. *Id.*

Ladue's resort to the "secondary effects" doctrine is unavailing, for several reasons. First, this "rarely used" doctrine (*R.A.V.*, 112 S. Ct. at 2557 n.11 (White, J., concurring)) has never been invoked to uphold a regulation of expressive activity outside of the area of "adult" entertainment. *See Renton*, 475 U.S. at 49-50. In light of the lesser degree of First Amendment protection normally afforded to "adult" entertainment, there is little warrant for extending the fiction underlying the "secondary effects" doctrine (that content-based regulation should be deemed content-neutral when the principal justification for regulating speech is to curb some secondary effect of the speech) to other forms of speech that are fully protected under the First Amendment. In any event, *R.A.V.* held

that the secondary effects doctrine is inapplicable when, as here, the alleged "secondary effects" consist of the reaction of the audience to the speech in question. *R.A.V.*, 112 S. Ct. at 2549.[15]

Second, in those cases in which the Court has invoked the "secondary effects" doctrine to uphold a regulation of a category of speech on the basis of content, the regulation did not amount to a total ban on that category of speech. Thus, in both *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court took great pains to note that the regulations at issue (both of which involved controls on the siting of "adult" movie theaters) still allowed for the operation of such theaters. In contrast, Ladue's Ordinance mandates an absolute, city-wide ban on signs conveying specified messages. There is serious question whether the "secondary effects" doctrine is properly invoked in order to ban altogether certain modes of expressing views on disfavored topics. *See, e.g., R.A.V.*, 112 S. Ct. at 2549 (questioning whether "an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech").

Third and most importantly, the Court has limited application of the "secondary effects" doctrine to those cases in which the expression being regulated has "markedly different effects upon [its] surroundings" than does similarly situated unregulated speech. *Renton*, 475 U.S. at 49. Thus, in *Discovery Network*, the Court refused to invoke the "secondary effects" doctrine in order to uphold a Cincinnati ordinance that banned commercial newsracks from city sidewalks but permitted the newsracks

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[15] There is no basis for contending that a proliferation of signs creates some objectively verifiable aesthetic concerns. Beauty is solely in the eye of the beholder. There is no justification for aesthetic concern over sign proliferation unless Ladue residents who view the signs find them distasteful -- and *R.A.V.* teaches that such reactions are not the type of "secondary effects" referred to in *Renton*.

of general-circulation newspapers to remain in place -- because "[i]n contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network*, 113 S. Ct. at 1517.

Ladue cannot seriously contend that the secondary effects of a political sign such as Ms. Gilleo's are more severe than the secondary effects of a "for sale" sign or any other type of sign permitted under the Ordinance. Clearly, one "for sale" sign causes the same amount of "visual clutter" as one "For Peace in the Gulf" sign. Ladue argues that in the absence of sign regulation, political signs posted on private residences would far outnumber "for sale" signs. But such a "tendency to proliferate" is not an effect of political signs themselves -- since, unlike an "adult" movie theater (which attracts unsavory elements), the posting of a political sign does not attract other signs. Rather, if repeal of all sign regulation were to lead to the posting of a large number of political signs, that would merely be an indication of the preferences of Ladue's citizens. Moreover, since Ladue can so easily avoid having to resort to content-based regulation and still achieve its desired aesthetic objectives (by, *e.g.*, adopting a content-neutral limitation on the total number of signs that may be posted at any residence or subdivision), there is considerable reason to question Ladue's protestations that its ban on political signs is designed solely to control the secondary effects of such signs. *See* R.A.V., 112 S. Ct. at 2550 ("The existence of adequate content-neutral alternatives thus 'undercuts significantly' any defense of such a statute [that discriminates against speech on the basis of content]") (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)).

In sum, the "secondary effects" test is wholly inapplicable to this case. Accordingly, the Ordinance cannot withstand First Amendment analysis, because it is defensible under neither the "time, place, or manner" doctrine nor the "secondary effects" doctrine, and Ladue

has not asserted any compelling interest in regulating signs in a content-based manner.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the judgment below be affirmed.

Respectfully submitted,

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